IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3436 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KARIMABEN K BAGAD

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3436 of 1996

MR RS SANJANWALA Sr.Advocate with Mr R S Sanjanwala and Mr Shamik S Sanjanwala for Petitioner No. 1

Mr A D Oza, GOVERNMENT PLEADER for Resp. No.1& 2

Ms. Manisha Lavkumar, Addl.Standing Counsel for resp. 3

Mrs. P J Davawala for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 29/03/2004

ORAL JUDGEMENT

The petitioner above named, has preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside an order passed by respondent no.4 herein under section 7 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (for short, 'SAFEMA') dated 23.3.1993 placed at Annexure 'G' Page no.45 and subsequent order of the Appellate Tribunal being No.F.P.A.No.28/AHD/93 dated 7.12.1995 placed at Annexure 'H', page No.81 against the petitioner.

2. It appears from the record that on 25.2.1977, the husband of petitioner - Karim Bachubhai who was detained by order under section 3(2) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "COFEPOSA act"). The said order was challenged by filing a writ petition being Special Criminal Application No.101/77. On 3.8.1977 when the said matter was being argued before the Court a point was raised that the petition could succeed and the detention order could fall on the ground of delay. Therefore, the learned Public Prosecutor incharge of the matter on behalf of the Government had written a letter dated 3.8.1977 to the State Government stating the above fact. He also recommended that the order may be revoked. On the strength of the said recommendation, on 4.8.1977, the Government had revoked the said order of detention which has been placed at Annexure 'C', page 24 to the petition. Since the order of detention was revoked by the State Government, the Court passed an order in the above petition on 8.8.1977 to the effect that since the detention order was revoked, the petition did not survive and, therefore, rule was discharged. On 6.10.1980, respondent no.4 issued a notice under section 6 of the SAFEMA to the petitioner. (Annexure 'E') On 23.3.1993, respondent no.4 passed an order holding that the petitioner was a person who fell within the ambit of section 2 of SAFEMA and proceedings under section 7 be taken against her and the property of the petitioner be forfeited under section 7 of the SAFEMA. An appeal was preferred against the said order unsuccessfully before the tribuanl. The petitioner preferred this petition challenging the order passed under the SAFEMA and the order of detention which came to the dismissed by this Court by judgment dated 27.2.1997. An SLP was preferred before the Hon'ble the Supreme Court against the aforesaid dismissal i.e. Criminal Appeal No.688/98 from SLP No.(Cri.) 2758/97 which came to be allowed. The

above judgment of this court was set aside and the matter was ordered to be remanded to this Court, by order dated 22.7.1998. Therefore, the petition is required to be heard.

3. The petitioner has challenged the aforesaid order on several grounds. It has been contended by and on behalf of the petitioner that the order impugned in this petition is illegal on the ground of delay since the order was required to be passed immediately and since there was an unexplained, inordinate delay, the order must fall on the ground of delay. It has also been contended that there was no material before the competent authority to pass an order impugned in this petition and therefore also the petition requires to be allowed and the order requires to be set aside. It is further contended that the order passed under SAFEMA was based on an order passed under the COFEPOSA. That the order passed under COFEPOSA did not remain in force and did not exist, then the order passed under SAFEMA could not be sustained and therefore, on that ground also, the order requires to be quashed and set aside. It is further contended that certain material was required to be placed before the appropriate authority and it has not been placed and certain material was not supplied to the petitioner and therefore, on this ground also the order impugned in this petition is illegal on the ground of non-observance of principles of natural justice. It has, therefore, been contended that the order impugned in his petition is illegal and, therefore, it may be set aside.

4. On receipt of the petition, rule was issued an in response to the service of notice of rule, Ms. Manisha Lavkumar, learned Addl.Standing Counsel for the Union of India appeared on behalf of respondents No.3 and 4 whereas Mr A D Oza, learned Government Pleader has appeared on behalf of respondents no.1 and 2. I have heard the learned Advocates for the parties and have perused the papers. It is not much in dispute that the order in dispute was recorded by the competent authority. The above events stated hereinabove are not in dispute at all. The matter was carried to the appellate tribunal unsuccessfully. The petition of the petitioner was dismissed by this Court. The Hon'ble Supreme Court has allowed the Criminal Appeal of the petitioner, set aside the order of this Court and remanded the matter back to this Court. These facts are not at all in dispute.

5. So far as the last mentioned principle is concerned, even the learned Addl.Central Government Standing Counsel has also agreed and she has also argued

that an order under COFEPOSA is sine qua non. for exercising power under SAFEMA. She has not disputed this proposition of law. Therefore, it may not be very much necessary for this court to deal with this aspect in details. In this respect it would be worthwhile to refer to the relevant provision made in section 2 of SAFEMA as under:

"2. Application - (1) The provision of this Act shall apply only to he persons specified in sub-section (2).

(2) The persons referred to in sub-section (1) are the following, namely;

(a) every person -

(i) who has been convicted under the Sea Customs Act, 1878, (8 of 1878) or the Customs Act, 1962 (52 of 1962) of an offence in relation to goods of a value exceeding one lakh of rupees; or

(ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount or value involved in which exceeds one lakh of rupees; or

(iii) who having been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those Acts; or

(iv) who having been convicted under the Foreign Exchange Regulation Act, 1947(7 of 1947) or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subsequently under either of those Acts;

(b) every person in respect of whom an order of detention has been made under Conservation of Foreign Exchange and Prevention of Smuggling Activities At, 1974 (52 of 1974):"

xxx xxx xxx

6. It is not much in dispute that in the present case, the order passed under COFEPOSA was challenged before this Court and ultimately it was withdrawn by the

appropriate authority. There is no dispute about the same. However, with a view to complete the judgment, we can have a reference to the said order which is there on record. It appears from a communication dated 3.3.1977 addressed to the Government of Gujarat in Home Department by the learned Addl. Public Prosecutor appearing on behalf of the State in Special Criminal Application No.101 and 98 of 1977 under which he recommended to the State Government to consider the revocation of the aforesaid order as it was likely to fall on the ground of delay. It appears that thereafter the State Government had passed an order dated 4.8.1977 at page 24 at Annexure 'C'which shows that in exercise of powers under section 11(i)(a) of the COFEPOSA Act, 1974, the Government of Gujarat had revoked the order of detention made by the State Government under section 3(1) of the said Act and directed that the person known as Karim Bachubhai be released from detention forthwith. This shows that the order of detention was revoked by the State Government in exercise of powers under section 11 of the said Act. It is not much in dispute that on account of the aforesaid revocation, this court had passed an order that the petition did not survive and, therefore, it was disposed of accordingly.

7. Learned Sr.Advocate appearing for the petitioner has argued that, as said earlier, an order under the provisions of COFEPOSA was sine qua non for exercising powers under SAFEMA and since the order under COFEPOSA was revoked or withdrawn, then the consequential effect would be that the power under SAFEMA could not be exercised.

8. So far as the principle is concerned, Ms. Manisha Lavkumar, learned Lavkumar has also agreed that the power under SAFEMA could be exercised on the strength of a valid order under COFEPOSA. However, she has further argued that there is a distinction between the exercise of powers under section 2 and the exercise of powers under section 11 referred to hereinabove. It is her argument that if an order was revoked or withdrawn under section 2 of the said Act, then, in that event, the power under the SAFEMA could not be exercised. She has also argued that in the present case, the power to revoke the detention order was exercised under section 11 and therefore, the said revocation was not within the four corners of section 2 and, therefore, since it was not a revocation under section 2 of the said Act, the powers under SAFEMA were still permissible and, therefore, the order in question could not fall on the ground that an order under the COFEPOSA was revoked.

9. It is required to be seen here that there is some background to the issue. The order in question was challenged before this court by way of filing Special Criminal Application referred to above. There the ground of delay was raised. Even the learned APP defending the cause of the State was with the petitioner on the issue of delay. He, therefore, sent his recommendation to the State Government for revocation or withdrawal of the order. The State Government accepted the proposal or recommendation of the Public Prosecutor and revoked the order of detention in exercise of powers under section 11 of the COFEPOSA Act. It is this background which is required to be considered for appreciating the arguments advanced by the learned Advocates for the parties.

10. It is true that section 2 makes it clear that the revocation under that provision would be only in cases where the revocation has taken place in the exigencies referred therein. It is true that revocation under section 11 of the COFEPOSA has not been expressly mentioned in section 2 thereof. However, it is also required to be considered that the background in the present case is quite different. Even the Public Prosecutor incharge of the cause of the State was with the petitioner on the point that the order could be set aside on the ground of delay. Therefore, he made the aforesaid recommendation and, therefore, the State Government revoked the order of detention in the said matter. This means that when the Court was about to allow the petition and set aside the detention order, revocation under section 11 of the said Act has taken place. In other words, looking to the above background, the said revocation could be treated to be equal to the quashing of an order by a judicial pronouncement of the Court.

11. It cannot be in dispute that an order revoked under section 2 would be equal to an order quashed by the Court. On this point, we find a decision of this court in the case of N D Chokshi v. Union of India, reported in 1992 (2) GLR 891 wherein this issue was required to be considered. Para 15 of the said decision is relevant for our reconsideration. In the said decision, it has been very clearly laid down that there is no difference between revocation by the competent authority and quashing and setting aside of the order by judicial pronouncement of this Court. In order to appreciate the said position, this court was required to consider a decision in the case of Ibrahim Bachu Bafan v. State of Gujarat, reported in AIR 1985 SC 697. On appreciating

the aforesaid situation, this Court came to a decision that looking to the above position, from the case decided by the Hon'ble Supreme Court in the case of Ibrahim Bachu Bafan (supra), it is clear that the ultimate effect of cancellation of the order of detention by the High Court under high prerogative jurisdiction and the order of revocation of order by the Government would be one and the same.

12. For a complete discussion and observation, it would be relevant to refer to para 15 of the said judgment hereunder:

"15. It should be appreciated before proceeding further the original orders of detention came to be revoked in Spl.Cri. Application Nos. 289 and 704 of 1990, 377, 745, 747 and 748 of 1991. It therefore becomes clear that in the above said six Spl.Cri.Applications the original orders of detention under COFEPOSA issued against the respective detenus came to be revoked. It is the contention raised by the learned Advocates of the petitioners that a valid order of detention under COFEPOSA is prerequisite for the issuance of the proceedings under SAFEMA. In support of their contention, the learned Advocates for the petitioners have invited the attention of this Court to the Supreme Court decision in the case of Union of India v. Haji Mastan (supra). In this decision it has been made clear that in view of section 6(1) of SAFEMA, the action under secs. 6 & 7 of SAFEMA may be taken against only those persons to whom SAFEMA applies. Looking to sub-section (2) of sec.2 of SAFEMA it appears that it applies to every person in respect of whom an order of detention has been made under COFEPOSA, provided that such order of detention has not been set aside by a court of competent jurisdiction. In view of this principle laid down by the Supreme Court in the case of Union of India v. Haji Mastan (supra), it must be accepted that initiation of proceedings under secs. 6 & 7 of SAFEMA pre-suppose a valid order of detention under COFEPOSA. As indicated above, in the aforementioned six petitions, original orders of detention have been revoked. The orders which have been revoked would not stand on a different footing than the orders which are set aside and quashed by the High Court while exercising the jurisdiction under Art.226 of the Constitution of India. This position is clearly

> obtained from the Supreme Court decision in Ibrahim Bachu Bafan v. State of Gujarat & Ors, AIR 1985 SC 697. It has been pointed out that when the High Court exercises the jurisdiction under Art.226 of the Constitution of India, it definitely does not make an order of revocation. By issuing a high prerogative writ like Habeas Corpus or Certiorary, High Court quashes the impugned orders before it. But as pointed out by the Supreme Court, the ultimate effect of cancellation of an order by revocation and by quashing of the same in exercise of the high prerogative jurisdiction vested within the High Court may be the same but the position as made by the Supreme Court in case of Ibrahim Bachu Bafan (supra) it is clear that the ultimate effect of cancellation of order of detention by the High Court under a high prerogative jurisdiction and the orders of revocation by the Government would be one and the same. It, therefore, shall have to be accepted that in the aforesaid mentioned six petitions, there were no valid orders of detention under COFEPOSA and therefore in absence of valid orders of detention under COFEPOSA the proceedings under SAFEMA could not have been instituted. It would therefore become clear that in the abovesaid six petitions the proceedings under SAFEMA would be bad for the above said reasons alone.

It is therefore, clear that the Division Bench of this Court has laid down that the effect of revocation of the order by the State Government and of an order setting aside the said order by a Court will be the same.

13. Now it is very clear that when an order passed by the detaining authority is approved by a competent Government and if the said order is confirmed by the Advisory Board, then the State Government can revoke the said order only under section 11 of the said Act. That is why, the State Government appears to have exercised the said powers of revoking its earlier order of the detaining authority i.e. powers under section 11 of the said Act. At that point of time, the State Government could not have exercised powers under section 2 as those stages had already gone. Therefore, merely because the power to revoke the order under section 11 was exercised by the State Government, it could not be said that the said revocation did not fall within the four corners of section 2 of the said Act and, therefore, the said revocation would not hit the order passed under the

SAFEMA. It would not therefore, be possible for this Court to agree with the argument of Ms. Manisha Lavkumar that since the exercise was under section 11 of the said Act, the revocation did not fall within four corners of section 2 of the said Act and, therefore, the said revocation would not affect the scenario and would not affect the validity of an order passed under SAFEMA.

14. In order to support the said contention, Ms Manisha Lavkumar, learned Addl.Standing Counsel has tried to refer to the observations made by this Court during the course of the judgment in this petition in order dated 27.2.1997. The pertinent observation of this Court can be gathered from para 7 thereof. Even the case of Attorney General was also referred by the learned Judge of this Court.

15. On the one hand, this judgment was set aside in Criminal Appeal by the Hon'ble Supreme Court as stated earlier and, therefore, the observations made in the said judgment of this court could not be independently read for the purpose of deciding the present petition. Secondly, the aforesaid decision of 1992 (2) GLR 891 (supra) was specifically cited in the said matter and it seems that despite the said position, this court had come to a finding that revocation under section 11 was not within four corners of section 2 and, therefore, it would not hit the exercise of powers under SAFEMA. Though the said judgment of the Division Bench appears to have been shown to the learned Judge, there appears to be no detailed discussion thereto. On this aspect of the case, learned Sr.Advocate for the petitioner has relied upon a decision in the case of Govt. of A.P. v. B. Satyanarayana Rao, reported in (2000) 4 SCC 262. The pertinent observations made in this decision may be reproduced for ready reference as under:

> "The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue. This is not the case here. Moreover, a case cannot be referred to a larger Bench on mere asking of a party. A decision by two Judges has a binding effect on another coordinate Bench of two Judges, unless it is demonstrated that the said decision by any subsequent change in law or decision ceases to be laying down a correct law."

Another decision cited by him can be gathered from the

case of State of U.P. and anr. v. Synthetics and Chemicals Ltd. reported in (1991) 4 SCC 139. The relevant observations of the Supreme Court from that decision can be reproduced for ready reference:

> "Incuria" literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'.

16. On the strength of the above observations, it becomes clear that when a judgment of a Division Bench of the same Court is shown, then a Single Judge is required to follow the same. In view of the aforesaid two citations of the Hon'ble Supreme Court and in view of the aforesaid decision of the Division Bench of this Court and considering the aforesaid decision of the learned Single Judge referred to hereinabove, I am of the view that this court is required to follow the decision rendered by the Division Bench of this court in 1992 (2) GLR 891 (supra) and, therefore, without further discussion on the subject, I am of the view that when an order based on the provisions of COFEPOSA has been revoked by the appropriate authority or when it has been set aside by a competent court, then there would be no ground in existence for exercising power under SAFEMA. I am also of the view that there cannot be any difference between a withdrawal or revocation of an order under section 11 of the Act and quashing and setting aside of an order by judicial pronouncement of a competent court. It is more so, when a regular petition was filed and detention order under COFEPOSA was challenged and when the court was about to allow the petition and set aside and quash the order of detention then and at that stage, the order of revocation was passed. Therefore, in the aforesaid background, the respondents cannot be heard to argue that the order of revocation passed was under section 11 of the said Act and since it was not an order covered by section 2 of the Act it would hit the order passed under SAFEMA. The net result is that the order under SAFEMA was based on the order under COFEPOSA and when on revocation of the order under COFEPOSA, the base had gone and the super structure could not stand and, therefore, on the above principles when the order passed under COFEPOSA did not stand, then the consequential order under SAFEMA also could not stand at all. Therefore, on this ground, the petition can be allowed and the order under SAFEMA can be set at note.

17. It has also been contended by the learned

Sr.Advocate for the petitioner that the order impugned in this petition suffers from vice of delay. The said ground has been taken up as an additional ground by way of amendment in the original petition at page 12 'B' (i). There it has been mentioned that the ground for detention is based on an alleged incident of 21.5.1975 and if the second respondent was genuinely satisfied about the detenu's activity, he could not have waited for about 21 months to pass the impugned order and, therefore, in absence of explanation for the inordinate delay, the order in question could not be sustained in the eye of law.

18. On this aspect of the case, we find that an explanation has not come from the detaining authority or from the State Government. Ms. Manisha Lavkumar, learned Addl.Standing Counsel arguing for the Union of India has advanced an argument for the purpose of explaining delay. Now it is required to be seen that the delay has been attributed to the competent authority and to the State Government and, therefore, the explanation should ordinarily flow from either the competent authority or from the State Government. The said explanation does not flow either from the State Government or from the competent authority. Therefore, in absence of any explanation from these two authorities, it would not be open to the Union of India to say something about the same. The reason is that if there was a valid reason for delay in passing the order, then the competent authority or the State would have communicated the same in the order itself or in the grounds for passing an order impugned in this petition. At least there would have been some affidavit or other material through which the competent authority or the State Government could have explained the delay. No such explanation has been rendered through any affidavit or through any material on record either by the State or by the competent authority for delaying the decision for nearly 21 months. In that view of the matter, there is no explanation rendered either by the State Government or by the competent authority. Therefore, the delay cannot be said to have explained by these two authorities.

19. This is not a short and ordinary delay wherein the delay could be attributed to some procedural aspect. The delay is of 21 months and considering the length of delay, it was required to be explained but it has not been explained. This clearly indicates that there was no immediate need for the competent authority to pass an order of detention against the petitioner and, therefore, on the ground of delay also, the order in question does

suffer.

20. In the case of Ahamed Mohaideen Zabbar v. State of T.N. and ors., reported in (1999) 4 SCC 417, it has been observed that when the State has not explained why it thought it necessary to wait till the adjudication proceedings before the Customs authority were over since that was not necessary for exercising the power under the COFEPOSA Act. There is no satisfactory explanation as to why the State Government did not exercise power earlier. It has to be held that delay in passing the order of detention was unreasonable. Hon'ble the Supreme Court has further observed that it would also have to be held that the explanation of the detaining authority as regards immediate detention passed by the detaining authority is not genuine. The difference in that matter and the difference in the present matter is that in the case on hand, the detaining authority has not rendered any explanation for the delay caused in exercising the power.

21. Learned Sr.Advocate for the petitioner has also contended that the petitioner was not aware as to the authority to which the representation could be made and therefore, a valuable right of making an effective representation under Article 22(5) of the Constitution has been frustrated and, therefore, the order of detention is illegal and on that ground also, the impugned detention is illegal. In support of the said contention, the learned Advocate has relied upon a decision in the case of Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51. However, when the present petition can be allowed on the aforesaid contentions, then it would not be necessary to deal with other contentions referred to hereinabove. Even the learned Sr.Advocate also agrees that if the order in question fall on the above grounds, the remaining arguments may not be dealt with. It is, therefore, clear that for exercise of powers under SAFEMA, the existence of valid order under COFEPOSA is a must. In the present case, we find that the order passed under the COFEPOSA was challenged before this court and since there was delay in passing the order, the learned Public Prosecutor recommended to the State Government to withdraw/revoke the said order. The proposal was accepted and the order was revoked under section 11 of the Act. In this background, I am of the view that when the order under the COFEPOSA was revoked under section 11 of the Act, then in that event, there was no need or valid reason for exercising power under SAFEMA. Therefore, the order under SAFEMA has to fall on the ground of non-existence

of a valid order under the COFEPOSA. Therefore, the present petition should succeed on the aforesaid grounds. Consequently, no other point is required to be dealt with.

22. For the foregoing reasons, this petition is allowed. The impugned order passed under section 7 of the Smugglers and Foreign Exchange, Manipulators (Forfeiture of Property) Act, 1976 by respondent no.4 herein on 23.3.1993 placed at Annexure 'G' Page no.45 and subsequent order of the Appellate Tribunal being No.F.P.A.No.28/AHD/93 dated 7.12.1995 placed at Annexure 'H', page No.81 are quashed and set aside. Rule is made absolute accordingly. D.S. permitted.

[D P Buch, J.]

msp